SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A.D. 1903.

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JAMES H. McKENNEY,
Clerk

HOWE SCALE COMPANY OF 1886
AND FAY-SHOLES COMPANY,
Petitioners,

vs.

WYCKOFF, SEAMANS & BENEDICT,
Respondent.

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BRIEF FOR RESPONDENT ON APPLICATION FOR WRIT OF CERTIORARI.

EDMUND WETMORE,
HENRY D. DONNELLY,
Attorneys and of Counsel for Respondent.

PRESS OF
A. H. KELLOGG, NEW YORK

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

HOWE SCALE COMPANY of 1886 and FAY SHOLES COMPANY,
Petitioners,

vs.

WYCKOFF, SEAMANS & BENEDICT,
Respondent.

Brief for Respondent.

Statement of Case.

This petition is filed in a case in which the respondent to the said petition is the *complainant* and the petitioners are the *defendant*

The gravamen of the bill is *fraud* and unfair competition in business. The allegations therein in respect to the registration of the name "Remington" as a trade-mark may be regarded as a matter of inducement to the charge of fraud.

> Putnam Nail Co., *vs.* Bennett 43, Fed. Rep., 800. Cited with approval by this Court in Lawrence Mfg. Co. *vs.* Tennessee Mfg. Co., 138 U. S., 549, 555.

The Petitioner Howe Scale Company of 1886, was, at the date of the filing of the bill, the general sales

agent in the United States of an Illinois corporation, known as the Remington-Sholes Company and was actively engaged in introducing, commending and advertising and in many ways offering for sale and selling the typewriting machines complained of.

The machines were made by the Illinois Corporation above named, whose factory was located at Chicago.

In its answer and otherwise, the Howe Scale Company, justifies by virtue of what it alleges to be the right of the Remington-Sholes Company, and fully identifies itself with that company.

The chief postulate of the bill and the case is that Respondent's product—typewriting machines—has for many years been known in the market and to the trade and public and referred to, identified, offered for sale and sold as the "Remington" typewriter, and that Respondent and its business had been known to and designated by the public as the "Remington Company" and the "Remington Typewriter Company." The defendant is charged with having *malo animo* inaugurated an inequitable and unfair competition in that it had for that purpose made use of a simulated corporate name, Remington-Sholes Co., and the designations "Remington-Sholes" and "Rem-Sho" in advertising for sale, offering for sale, and selling such machines in the manner alleged in the bill.

The essential vice of the Petitioner's acts consisted in the adoption and use of the name "Remington" in the corporate name, Remington-Sholes Co., and as a designation or a part of a designation for Petitioners machines, and in advertising *media*, etc. The substance of the prayer of the bill is that the use of the name "Remington" and the abbreviation "Rem-Sho" by the Petitioner, Howe Scale Co., as it is employed may be prohibited.

The courts below in their decisions recognize the right of Respondent, as against the Petitioner, Howe Scale Co., to the exclusive use of the name "Remington."

Shortly after the decree was made and entered in the Circuit Court, the Remington-Sholes Co., eliminated the word "Remington" from its corporate name, machines and advertising *media*, discontinued the use of the abbreviation "Rem" and substituted the name "Fay" who was the chief promotor and stockholder and president of that company, in all connections in which the name "Remington" had theretofore been used. Shortly after the Remington-Sholes Co., ceased to use the name "Remington" in its corporate name and business and upon its machines, Franklin Remington left the employ of that company, and became President and General Manager of the Foundation & Contracting Co., a corporation under the laws of the State of New York, and has since devoted his time and attention to the business of the Foundation Co. in the City of New York.

Statement of Facts.

The Respondent is a corporation created by the laws of the State of New York in 1892, and is the successor in the typewriter business and the good will thereof of two Remington corporations—E. Remington & Sons and Remington Standard Typewriter Manufacturing Company.

R. pp. 768–780.

The elder predecessor and the founder of Respondent's typewriter business was E. Remington & Sons Corporation, created in 1865, under the laws of New York, for the manufacture and sale of fire arms, etc.

R. pp. 663–665.

From that time until 1886, said corporation was largely engaged in the manufacture of guns, and during a portion of the time manufactured and sold

sewing machines, typewriting machines and agricultural implements.

R. p. 39.

The typewriter business of E. Remington & Sons Corporation was established in 1873, and was continued at its works at Ilion, N. Y., until 1886, when that branch of its business was sold and transferred to the predecessor of Respondent as hereinafter set forth. E. Remington & Sons were *pioneer* typewriter manufacturers.

R. pp. 39, 43–46, 61, 62, 716, 101.

The first typewriter which they manufactured was an upper case or capital letter machine, and was known and designated as the "Sholes-Glidden" typewriter, Sholes, Glidden and others being the inventors of the improvements embodied in the first model, which was brought to the works of E. Remington & Sons at Ilion, N. Y., in February, 1873.

R. pp. 91, 92, 55, 42.

After the model was brought to Ilion, and before the machines were put upon the market many improvements were made therein by the Superintendent and skilled mechanics of Remington corporation.

R. pp. 43, 45, 101, 102.

Subsequently and about 1877, another style of machine was constructed and put upon the market by E. Remington & Sons, which was provided with both upper and lower case characters.

R. pp. 46, 91, 93.

This latter machine became known as the Remington No. 2, the upper case machine thereafter being known as the Remington No. 1.

R. p. 93.

After the No. 2 machine came on the market the demand for the No. 1 gradually fell off, and the

manufacture of that style of machine was practically discontinued about 1884.

R. pp. 93, 94, 46.

Prior to 1882, the machines manufactured by E. Remington & Sons were sold through various agencies in the United States and to some extent in Europe.

R. p. 52.

In 1882, the firm of Wyckoff, Seamans & Benedict became the *exclusive* agent for the sale of the Remington machines, and from that time until March, 1886, they took the whole typewriter output of E. Remington & Sons works, and sold the same throughout the United States, and in many foreign countries. The typewriter business of E. Remington & Sons, was a constantly growing one and was carried on without interruption from 1873 until 1886, and during that time many thousand machines were manufactured and sold.

R. pp. 52, 53, 45.

For the first year or two, after E. Remington & Sons began the manufacture of typewriters, their machines were marked and designated as the "Sholes & Glidden" and were known by that name as "The Typewriter."

R. pp. 91, 190.

Subsequently and about 1875, the name Sholes & Glidden was left off the machines altogether, and from that time forth they were generally known as the Remington machine and the Remington typewriter.

R. pp. 91, 92, 64, 65.

As early as the year 1880, the machines were marked with and bore the name "Remington," which was then and afterwards placed conspicuously on the paper-table of the machine, and was also

stamped on the machine in connection with other words such as perfected and standard and the name of the manufacturer.

R. p. 791.

In March, 1886, E. Remington & Sons sold their entire typewriter business to Wyckoff, Seamans & Benedict, said sale and assignment covering all rights, privileges, franchises, licenses, patents, trade-marks and trade-names under which the machines had theretofore been manufactured, and all special tools, machinery, patterns, models, raw material, and material in process of manufacture. Wyckoff, Seamans & Benedict also took a lease of that portion of the factory works where the typewriter business had theretofore been carried on, and employed the skilled workmen who had theretofore been engaged in the manufacture of the machines.

R. pp. 716–722, 725, 728.

Wyckoff, Seamans & Benedict continued the business temporarily, and until April 1886, when a corporation was formed under the laws of the State of New York, known as the Standard Typewriter Manufacturing Co., and afterwards as the Remington Standard Typewriter Manufacturing Co., which corporation took over all the property, rights, franchises and interests theretofore acquired of E. Remington & Sons, by said firm, and the same business of manufacturing typewriting machines was thereafter continued by said corporation until 1892. Shortly after the sale and transfer of its typewriter business to Wyckoff, Seamans & Benedict, E. Remington & Sons corporation became insolvent and was dissolved.

R. pp. 730, 735, 772–776.

From 1886 until 1892, the sale of the machines was continued through the agencies of the firm of Wyckoff, Seamans & Benedict, they taking the

whole typewriter product of the Remington factory. During this period the quality of the machines was improved, the sales were largely increased, and to meet the demands of a constantly growing business other and enlarged works were secured near the old plant.

R. pp. 74, 75, 76, 79, 96, 97.

The machines were extensively advertised and sold both in the United States and in foreign countries, and became generally known in the trade and to the public as the Remington typewriter, the different models and styles of the machines being known as the Remington No. 1, 2, 3, 4, 5, 6, etc.

R. pp. 97, 98, 95, 211.

In 1892 a corporation was formed under the laws of the State of New York, known as the Standard Typewriter Co. which purchased and took over all the property and assets of the firm of Wyckoff, Seamans & Benedict, and this corporation was subsequently consolidated with the Remington Standard Typewriter Manufacturing Co., forming the respondent corporation, Wyckoff, Seamans & Benedict, which succeeded to all the rights, property, franchises, etc. of every name and nature theretofore owned by its predecessors and succeeded to the business including the good will thereof, theretofore carried on by its predecessors.

R. pp. 734–752.

Prior to and since 1892, many thousand machines were and have been annually manufactured and sold in all parts of the civilized world and the machine had prior to 1892, become generally and widely known to the trade and to the public and to purchasers and users thereof as the "Remington" typewriter.

R. pp. 92, 95, 75, 76, 64, 120, 141, 158, 166, 190, 203, 207, 273, 274, 320, 321.

Up to May 1st, 1899, respondent had expended more than a million dollars in advertising its ma-

chines and making them known to the public in all parts of the civilized world as the "Remington" typewriter. Large sums were also expended by dealers and outside representatives who sold the machines.

R. p. 212.

That respondent's business and machines had acquired a world-wide reputation when the Remington-Sholes Typewriter Co., was projected and organized was a conceded fact in the Courts below. The Petitioners counsel both in their brief and in oral argument admitted that "when the Remington-Sholes Co. and its predecessor entered the field Complainant had a world-wide reputation." Obviously that reputation was acquired in the manufacture and sale of the Remington typewriter, as that was the only business that Respondent carried on.

The Circuit Court speaking through Judge Wheeler, among other things, said: "The intricate and delicate machinery of typewriters requires good materials and nice workmanship, and their reputation depends largely upon the quality of their manufacture. The Remington typewriter was among the pioneers, and one of the foremost in reputation for good construction. That the introduction to the markets of another machine with that name upon it, at the time when the Remington-Sholes machine appeared, would make confusion in the plaintiff's trade, and tend to pass off the new machines for the regular Remington machines of the plaintiff needs no proof but the circumstances; *that it actually did have that effect well appears from the evidence.*"

Pet. p. 49.

The Circuit Court of Appeals speaking by Judge Lacombe said: "It is not disputed here that the firm and the corporation of E. Remington & Sons acquired a high and well deserved reputation for

careful workmanship in every branch of manufacture which it undertook, nor is it disputed that the typewriting machines which the corporation and its successors have continuously manufactured at Ilion, are most favorably known to the public and associated in the public mind with the name "Remington" so that the ordinary purchaser is quite likely to assume that a machine offered to him for sale as a "Remington" has come from the establishment founded by the Remingtons at Ilion, nearly half a century ago. To this manufacture and trade complainant succeeded in 1886; it thereupon became entitled to conduct the business of manufacturing machines and selling them as Remington machines, and would have the right to invoke the aid of a Court of Equity to restrain another trader from any action which would be calculated unnecessarily to confuse the goods of his own make with those of Complainant."

Pet. p. 58.

The proofs in the case establish:—

1. That prior to 1894 the only Remingtons who had been engaged in the manufacture or sale of typewriting machines were Respondent's predecessors, and their writing machines were not only the first practical typewriters given to the world, but were the only writing machines that were ever known as or designated by the word "Remington," or bore that name, until the so-called Remington-Sholes Typewriter was put upon the market.

2. That prior to the year 1894, and before the organization of the "Remington-Sholes Typewriter Co.," "Remington Company," "Remington Typewriter Co.," etc., in the mind of the public meant the Complainant and its business.

3. That the typewriting machines manufactured and sold by Respondent and its predecessors had for many years been known to the trade and purchasers and users of writing machines as the Rem-

ington Typewriter, and had been so designated, offered for sale, and bought and sold, and that the name "Remington" had come to denote Respondent's product in the mind of the public.

R., pp. 64, 75, 92, 120, 141, 148-165, 166, 190, 201-204, 272-275, 275-278, 283, 288, 289, 329-336, 336, 337, 493, 607-610, 235, 236.

GENESIS OF THE PETITIONERS AND OF THE REMINGTON-SHOLES MACHINES.

The *nominal* defendant in this case is the Howe Scale Company, a corporation organized under the laws of the State of Vermont in the year 1886, and which, since that time, has, principally, been engaged in the manufacture and sale of scales, etc. In or about the year 1897, it became the general sales agent of the Remington-Sholes Co. in and for the United States, and sold the so-called "Remington-Sholes" typewriters, or "Rem-Sho" typewriters through its various agencies and offices in this country. Shortly before the hearing of this case by the Circuit Court, it discontinued the sale of the "Remington-Sholes" typewriter, and has not since been in the typewriter business. The *real* defendant in this case is the Remington-Sholes Co., now the Fay-Sholes Company, which assumed, conducted and paid for the defense of this suit against its agent the Howe Scale Co.

R., pp. 16, 8, 27, 28, 1,358.

THE HISTORY OF THE REMINGTON-SHOLES CO. AND THAT OF ITS PREDECESSORS, PROMOTORS AND CORPORATORS IS SUBSTANTIALLY AS FOLLOWS:

In or about the year 1892, one Zalmon G. Sholes, whose father, C. Latham Sholes, had made some inventions, which were with those of other persons embodied in the earlier forms of the Remington

typewriter, made a model typewriting machine, which he designated as and marked "The Z. G. Sholes." It was a working model. This model was destroyed by fire and another one was subsequently constructed, on the same general lines, in the Winter of 1892-93. After Z. G. Sholes built the first model, other persons became pecuniarily interested in it, and in his applications for patents relating to certain specific features embodied in it. In or about April, 1893, Sholes and his associates organized a corporation under the laws of the State of Wisconsin under the name and style of "The Z. G. Sholes Co." The purpose of organizing this Company was to manufacture and sell typewriting machines similar in structure to "The Z. G. Sholes" model. Both the model and the Company bore the name of Sholes the inventor of the novel features in the machine, but it was not deemed necessary to associate his name with that of any of his associates, although they held a large majority of the capital stock of The Z. G. Sholes Company.

R., pp. 390, 391, 392, 397.

The Z. G. Sholes Co., purchased and installed machinery in its shop with which to manufacture tools to build machines like "The Z. G. Sholes" model, but after starting on the tools, and running for a few months, Sholes' associates decided that they would not proceed further in this new enterprise, and their interests in "The Z. G. Sholes model" and "The Z. G. Sholes Co." were sold to Carver and Franklin Remington in August, 1893.

R. 400, 401, 402, 403.

These two Remingtons were the sons of one Samuel Remington, who at one time had been connected with and held an official position in the corporation, E. Remington & Sons. At the time they purchased an interest in The Z. G. Sholes model and Company, they were associated together in the con-

tracting business in the City of Chicago, and were then engaged in excavating a portion of the drainage canal in that city. At the time of purchase and prior thereto, neither of them had been engaged in the manufacture or sale of typewriting machines, and had no knowledge of or skill in the typewriter business. The proofs also show that Z. G. Sholes then had little or no practical knowledge of typewriter manufacture.

R. pp. 56–59, 412, 447.

After the Remingtons became associated with Sholes in the ownership of the model and the stock of The Z. G. Sholes Co., and in the Fall of 1893, they in company with Sholes, came east and endeavored to sell the model and the alleged inventions therein embodied to respondent and also to the Remington Arms Co., of Ilion. The evidence in the case shows that at the time the Remingtons acquired their interest in The Z. G. Sholes model, they had no idea of personally engaging in typewriter manufacture. Their purpose was to create a stir at Ilion, and dispose of their interests, either to the respondent or to the so-called Remington Arms Co., which concern was not then and never has been engaged in typewriting manufacture.

R. 404, 405, 414, 415.

During the period that the model was being exhibited to the public at Ilion, and elsewhere, it bore the name "The Z. G. Sholes." Failing in their efforts to dispose of the model and alleged inventions therein, either to the Remington Arms Co. or to respondent, the Remingtons and Sholes returned to Chicago, and after their return conceived the idea of organizing a corporation to manufacture and sell typewriters embodying the features of construction shown and illustrated in "The Z. G. Sholes" model. Some time in November, 1893, the name of the model was changed to "Remington-Sholes." Sholes

testified that the name was changed because it was thought that the name "Remington" would be a valuable addition to his name inasmuch as that name had been used in connection with respondent's business and machine.

R. pp. 417, 418, 425, 426.

Prior to the organization of the Remington-Sholes Typewriter Co., the Remingtons had expended about $8,000 or $9,000 in purchasing the interests of Sholes' associates in "The Z. G. Sholes" model and in the stock of "The Z. G. Sholes Co." In addition to this sum, it is alleged that they paid out and expended for salary to Sholes, wages of a mechanic, who made some slight changes in the model, for traveling expenses, hotel bills, etc., while endeavoring to interest capitalists in the model machine, some shop-rent, attorney fees, etc., $6,000 or $7,000 more, making a total expenditure of about $15,000.

R. pp. 412, 413, 430.

Sholes says that at the time the name of the machine was actually changed, he did not consult the Remingtons, but it is clearly manifest that the Remingtons knew a change of name was to be made and they subsequently ratified the change and accepted the fruits thereof. The allegation in the brief of petitioners that at the time the name of the model was changed, Sholes and the Remingtons had labored together for many months and had reconstructed the machine is incorrect, as the proofs show that the Remingtons did not acquire their interest in the model until about the 26th day of August, 1893, and the name was changed some time in November 1893, and shortly after they returned from the eastern trip. The labor alleged to have been performed by them consisted principally in their journey to Ilion, etc., to sell the model as heretofore stated and covered a period of two or three months. During that time and prior to the organization of the Remington-Sholes

Typewriter Co. the model machine was not "*reconstructed*" as the proofs show that no material changes were made therein. Prior to the time of the organization of the Remington-Sholes Typewriter Co. no machine was built by The Z. G. Sholes Co. and none was ever constructed by the Remingtons and none by Sholes except the model machine destroyed by fire and the model constructed by him which furnished a basis for the organization of the Remington-Sholes Typewriter Co.

Furthermore the Petitioners say in their brief, when referring to the Z. G. Sholes Co. that "No machine was ever made or sold by it."

R., pp. 427, 825, 826, 417, 419, 414, 416, 405, 400, 401, 390.

The Circuit Court of Appeals speaking by Judge Lacombe said: "In November 1893 the name of the machine was changed from "The Z. G. Sholes," to "Remington-Sholes," that is to say the name on the model was changed and the parties interested began to talk of the machine as the "Remington-Sholes," but no such machine had apparently been manufactured and offered for sale."

Pet. p. 60.

And again the learned Judge observed "some suggestion had been made that the machines existed before the incorporation; that they were produced by the Remingtons and Sholes individually at the time when the Remingtons had gone into the typewriting business with Sholes on their own account and had the right to sell all their goods under their own name. The record is very voluminous and we may have overlooked some item of proof, but a careful examination of it does not sustain this proposition. Prior to the formation of the Remington-Sholes Typewriter Co. no machines had been sold or offered for sale. Two or more (two) had been made as models and the name on them was changed from "The Z. G. Sholes" to "Remington-

Sholes," but the new name had not become associated with the machine except in the talk of the future corporators among themselves; the public knew nothing of any such name in connection with a typewriter, indeed did not know the junior Remingtons or even Sholes as a producer of typewriters.

Pet., pp. 63, 64.

There was no existing or going business prior to or at the time of the organization of the Remington-Sholes Typewriter Co. nor was there any good will of such business theretofore established or carried on by Sholes and the Remingtons or by either of them.

Pet. Brief, p. 4.

About six months after the Remingtons acquired their interest in The Z. G. Sholes model and The Z. G. Sholes Co. and shortly after the name of the model machine had been changed, Sholes and the Remingtons secured the services and the financial aid of two large Chicago capitalists, Charles Norman Fay, and Franklin H. Head, who afterwards became the principal stockholders of the Remington-Sholes Typewriter Co. Fay was the chief promotor of the enterprise and in May 1894, caused a corporation to be organized under the laws of the State of Illinois, under the name and style of Remington-Sholes Typewriter Co. For the purpose of organizing the corporation its capital stock was fixed at $150,000, that is 1500 shares of stock of the par value of $100 per share. In order to make the stock full paid it was issued to Sholes and the two Remingtons, in payment for the model, etc., which they transferred to the Company. No cash was actually paid for any of the stock subscribed for by Sholes or the Remingtons. After the stock was issued, Sholes and the Remingtons turned over to Fay, the chief promotor, one-third part of it to-wit, 500 shares of the par value of $50,000.

Shortly after the organization of the Company, the capital stock was increased to $250,000. The additional stock was taken by Fay, Head and others for the purpose of furnishing working capital for the Company. That a majority of the stock and the control of the Company passed into the hands of Fay, Head and others after the Company was organized is manifest from the certificate filed by the Company in 1896, wherein it appears that Fay and other persons than the Remingtons held a large majority of the stock of the Company.

R., pp. 406, 410, 418, 421, 422, 835, 841.

Counsel for Petitioners admitted in their brief and in oral argument in the Courts below that "doubtless Mr. Head and Mr. Fay (Corporators) also agreed with Mr. Sholes that the name "Remington-Sholes" was a "good combination". It offered a talking point for that machine."

Counsel also conceded in argument in the Courts below that the choice of the name "Remington-Sholes" and "Remington-Sholes Typewriter Co." and "Remington-Sholes Co." was an intelligent one. That in choosing the name "Remington", the corporators fully understood the value of that name in connection with the so-called "Remington-Sholes" machine and the "new born" Remington-Sholes Typewriter Co. is shown in the record wherein it appears that Fay attached great value to the name. Shortly after the corporation was organized and before any machine had been made, advertised, offered for sale, or sold, and before the Company had obtained any business or possessed any good will in any typewriter business, Fay expressed the opinion that the name Remington would be of great assistance in selling the new machine.

Record p. 447, Pet. pp. 64, 65.

Moreover in the Fall of 1895, and after the machine had been manufactured and sold for several months, Fay ragarded the machine as of very little value

and remarked to Sholes that "the only value he attached to it was the name 'Remington-Sholes.'"

R. p. 419.

The Remington-Sholes Typewriter Co. constructed its machine substantially on the lines of "The Z. G. Sholes" model, making only minor changes and alterations therein in preparing the machine for the market. The first machine according to Sholes' testimony was sold in or about December, 1894, but one of Petitioners' witnesses testified that according to his recollection, the first machines were shipped from the factory about April, 1895

Record, pp. 410, 411, 1110.

After the Remington-Sholes Typewriter Co had manufactured and sold several hundred machines, it became financially embarrassed and it was necessary to reorganize the business, and to that end its property and assets were sold and purchased by Fay as Trustee for the benefit of the stockholders of the old Company. He subsequently transferred the property of the old concern to the Remington-Sholes Co., which was organized in or about April, 1897.

R. pp. 410, 411, 422, 835–842, 1355, 1356.

The Remington-Sholes Co. organized in April 1897, but which was but a reorganization of the old concern, was unsuccessful under the management of Franklin Remington and Sholes, both of whom were *tyros* in the typewriter business. Some time previous to the failure and reorganization of the old Company, Fay took the management largely into his own hands, organizing the new Company, he giving the old stockholders an interest therein equal to their stock holdings in the old concern.

R. pp. 839, 843–847, 412, 410, 411, 419, 1356.

The capital stock of the new or reorganized Company was fixed at $300,000, that is to say 3,000

shares of stock of the par value of $100 each. In the new allotment of shares of stock Franklin Remington was given 150 shares of the *common* stock. That is to say he had one twentieth part of the stock of the Company. Neither Carver Remington nor Sholes had any interest or connection with the reorganized Company. Carver Remington's connection with the Remington-Sholes Typewriter Company was only nominal.

R. pp. 843, 1356, 567, 410, 411, 412, 422, 882, 883, 884, 893, 896, 900, 908.

The proofs in this case show that the machines of the Petitioners manufactured by the Remington-Sholes Typewriter Co., and by Fay and the Remington-Sholes Co. always bore the name "Remington-Sholes," and that those designations were used in catalogues and advertising *media*.

R., pp. 24, 27, 1103, 1109.

After about July 1st, 1897, the name "Remington-Sholes" was abbreviated to "Rem-Sho," which had theretofore been employed as a telegraphic code address. It was placed upon the machines and used in advertising *media*, but such abbreviation was always intimately and inseparably associated and used with the words "Remington-Sholes" in the corporate name "Remington-Sholes Co." The proofs establish that the name "Rem-Sho" was known and understood in the trade and among purchasers and users of typewriting machines to be merely an abbreviation of the name "Remington-Sholes;" that Petitioners and their agents and dealers continued to designate and advertise their machines for sale, and offer them for sale, and sell them as "Remington-Sholes" typewriters. The designation "Remington-Sholes" was continuously used in catalogues, and was employed upon signs, and the machines were always so designated and sold in foreign countries. The Petitioner, Howe Scale Company, admitted in its answer in this case

that it had advertised the machine as "Remington-Sholes" typewriters.

R., pp. 27, 1353, 1486, 1044, 1081, 1006, 1027, 1124, 1134, 1236, 1252, 1256, 1258, 1273, 1460, 1464, 524, 530, 864, 882 900.

During the progress of this suit, the Remington-Sholes Co. changed the design and finish of its machine, enamelling the frames in plain black instead of a bronze finish which they first used, and designated said machine as the Rem-Sho—Remington-Sholes No. 6, and in that respect made the design and finish of their machines more nearly like Respondent's. Respondent's machines that were most largely sold and used in this country then were and now are designated "Remington Typewriter No. 6."

R., pp. 555-6, 545.

The evidence shows that purchasers of typewriting machines are ordinarily of that class who are unacquainted with the mechanical construction of the machines; that it is the exception that purchaser possesses any information in detail of the typewriter, and that it is the rule in the larger cities that the business man does not even examine the machine which he purchases, and that very few buyers are operators. The purchaser relies mainly upon the trade-name or designation of the machine and its repute in the market.

R., pp. 543-545, 549, 594, 601, 602, 606.

The proofs also show that the only instances and connections in which the Remington-Sholes Typewriter Co. or the Remington-Sholes Co. ever gave any alleged cautionary notices to the public were that for a short while the Remington-Sholes Typewriter Co. displayed the words "Not the Remington Standard" upon the window of its *Chicago* office, and caused the same words to be printed in the *Chicago* business directory in the year 1894. There is no evidence showing that the advertise-

ment in the Chicago Directory was continued after the year 1894, and the evidence does show that no Remington-Sholes machines were put upon the market at a date earlier than December, 1894.

R., pp. 1445, 1455, 439.

The Remington-Sholes Typewriter Co. afterwards removed its office from Monroe Street, in Chicago, to another location in that city, and it does not appear that after such removal those words were used upon its signs in Chicago or anywhere else. They were never used upon the machine or on the packing cases containing the same.

R., pp. 483, 484.

An alleged cautionary notice was also printed in their catalogues containing about 25 pages of printed matter, the same being printed near the end of the catalogue. This notice like the one on the office window was ambiguous, and referred to a machine which Petitioners designated as the "Remington Standard." The notice did not refer to Respondent itself or disclaim any connection with the old Remington establishment whose successor Respondent was and is. These are the only instances in which they gave printed cautionary notices.

On the back side of the title page of many of the catalogues published and circulated, the Petitioners printed in large capital letters the words "THE ONLY MACHINE NOW MADE BY A REMINGTON."

If the catalogue did reach a purchaser it was more likely to mislead than to enlighten him.

While most of these catalogues were placed in the hands of Petitioner's agents and dealers there is no proof that such agents and dealers passed them on to the *ultimate* purchasers of machines.

The evidence in the case is that the ordinary purchaser does not read catalogues (R., p. 370), and

hence this alleged cautionary notice was not likely to come to the attention of the ordinary purchaser.

R., pp. 485, 512.

Petitioners also caused to be published and circulated in connection with the sale of their machines the statement that it was "The only typewriter manufactured to-day by a REMINGTON." "Strong, reliable and accurate, it represents the SECOND GENERATION of typewriter manufacturers bearing *this great name.*"

The Petitioners in their instructions to their agents and dealers, after setting forth the merits of the so-called "Remington-Sholes" typewriter, said: "The machine has now been fully explained, and it remains with the salesman to add such other interesting facts such as the history of the company, the connection of our Mr. Remington with this machine and the relation of the old Remington Standard, the fact that this is the SECOND GENERATION of typewriter builders, and that *the same standard of excellence is being maintained in the manufacture of this machine as all other goods which have been produced by the Remingtons.*"

R., pp. 973, 972, 883, 881.

These statements and others of similar import were constantly made and repeated by agents and dealers who also frequently asserted that the Remington-Sholes machine was the *new* and improved Remington typewriter and also that it was the *real* Remington machine.

R., pp. 986, 983, 978, 972, 898, 896, 889, 1038, 1043.

The proofs in the case show confusion in the mind of the public in respect to the identity of the Remington-Sholes Company's business and product with that of Respondent, and that purchasers were actually misled and purchased Petitioner's machines as and for Respondent's.

R., pp. 482, 485, 510, 518.

Brief of Argument.

I. If the petitioners have a remedy by appeal to this Court, as alleged in Sub-Division 13, pp. 15 and 16, of their petition, then this application for a writ of Certiorari should be denied.

In Re TAMPA SUBURBAN RY. CO., 168 U. S., 583; PULLMAN PALACE CAR CO. *vs.* CENTRAL TRANSPORTATION CO., 171 U. S., 138.

II. This Court takes jurisdiction by Certiorari only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.

American Construction Co. *vs.* Jacksonville Ry. Co., 148 U. S., 372; Forsyth *vs.* Hammond, 166 U. S., 506; *In Re.* Woods, 143 U. S., 202 Lau Ou Bew's case, 141 U. S., 583.

III. The inquiry upon this application is whether the questions involved in this case are of such peculiar gravity and general importance in themselves, or whether there is any such conflict of decision on matters of law as to make it the duty of this Court to issue the writ applied for herein.

A. NO QUESTION OF PECULIAR GRAVITY OR GENERAL IMPORTANCE IS INVOLVED IN THIS CASE.

The questions here in controversy simply concern the parties to this action.

The suit was brought to restrain the acts of the petitioner, Howe Scale Company, a corporation, which resulted in and constituted an unfair and fraudulent competition on its part with respondent in respect to the manufacture and sale of typewriting machines.

The essential vice of petitioner's acts consisted in the adoption and use of the name "Remington" in the corporate name "Remington-Sholes Co.," and as a designation, or a part of a designation, for petitioner's machines and in the use thereof in advertising *media*, etc.

No question of the construction or validity of any Federal or State Statute is involved here. No constitutional question or matter affecting the interests of the nation in its internal or external relations is involved.

All three judges of the Court of Appeals who decided this case were of equal rank, and a majority of them concurred in the findings and decisions of the Circuit Court, except in one unimportant particular.

The only principle of law arising in this class of cases is stated by Lord Halesbury in Birmingham Vinegar Co. *vs.* Powell, App. Cas., 710 (1897), to be "That no man can have any right to represent his goods as the goods of another person," and he said that all the rest are questions of fact.

Manifestly, each case of this character depends upon its own facts and circumstances, and must be decided upon the application thereto of this well settled principle which has received no substantial modification in recent years.

The cardinal rule upon the subject is that no one shall by imitation or any unfair device induce the public to believe that the goods offered for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own product or merchandise.

Coats *vs.* Merrick Thread Co., 149 U. S., 562.

The crucial question here was therefore one of fact, whether the petitioners were guilty of the fraudulent acts charged in the bill; that is, had they resorted to any artifice, or done acts calculated to mislead the public and induce it to believe that the goods they offered for sale were the goods of the respondent. Upon the evidence in the record the Courts below found that the acts of the petitioners constituted a fraudulent infringement and invasion of the rights of complainant, and an unfair and inequitable competition. (Pet., p. 73.)

There was no conflict of opinion in this case between the judges of the courts below in respect *of matters of law.*

The dissent of Judge Wallace was solely as to questions of fact. He did not dissent from any proposition of law enunciated in the majority opinion of the Court of Appeals. In fact the learned Judge had already laid down in the Rogers case (70 F. R. 1019) the proposition quoted and applied in the prevailing opinion here. (Pet. p. 62.)

It is therefore manifest that Judge Lacombe correctly observed that "the principles of law govering cases of this kind are simple and easily stated; the only difficulty is their application." Pet. p. 61.

The principle laid down by this Court in the Singer case (163 U. S. 179) "that every one has the absolute right to use his own name honestly in his own business even though he may incidentally interfere with and injure the business of another having the same name," "but although he may use his own name, he cannot resort to any artifice or any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name," was referred to and recognized by the Circuit Court of Appeals in this case. But neither Franklin Remington nor Carver Remington nor any other individual of the name of Remington was a party defendant to this suit. No

injunction has been issued against any individual bearing the patronymic Remington, and no rights of such individuals to use their names in their business have been impaired or interfered with by the findings or decisions herein.

In view of subsequent events and the voluntary acts of the Petitioners the questions involved in this case have become largely moot questions and, comparatively, of minor importance.

The nominal defendant, the Howe Scale Co., has no real interest in this appeal.

Shortly before the hearing of this case by the Circuit Court, it discontinued the sale of the "Remington-Sholes" typewriter, and has not since that date been engaged either as agent for the Fay-Sholes Co., or otherwise, in the typewriter business.

It further appears in the petition herein (p. 11) that after the decision of the Circuit Court below, and about December 1901, the Petitioner, Fay-Sholes Co. (then bearing the name Remington-Sholes Co.) changed its corporate name and ceased to make and sell its machines under the designation "Remington-Sholes," and also "Rem-Sho," substituting for the word Remington, the name of its chief promoter, President and stockholder, Fay. The corporation was thereafter styled Fay-Sholes Co. and its product Fay-Sholes typewriter, and since that date its business has been carried on and its product advertised and sold under such designations.

The interest of the Petitioner, Fay-Sholes Co., in any alleged right to use the name "Remington" as a part of its corporate name or as the designation of its product, in view of the time which has elapsed since it discontinued such use and the extensive business it alleges it is now carrying on, would seem to be largely academic.

It further appears that Franklin Remington left the employ of the Fay-Sholes Co., after the change of its name, and has organized another corporation known as the Foundation and Contracting Co., of

which he has become the President and business Manager, and is now conducting a business of a different character in the City of New York. (See answer p. 1f).

Franklin Remington's chief value to the Remington-Sholes Co., manifestly, consisted in his name Remington and not in any knowledge or skill in the typewriting business possessed by him.

The occasion for his connection with the Remington-Sholes Co., having ceased, his employment ceased and he sought other fields of activity.

B. THERE IS NO CONFLICT IN THE DECISIONS OF THE UNITED STATES CIRCUIT COURTS IN THIS CLASS OF CASES, IN RESPECT TO THE PRINCIPLES OF LAW GOVERNING THEM, AND THEY ALL RECOGNIZE THE PRINCIPLES WHICH FROM TIME TO TIME, HAVE BEEN ENUNCIATED BY THIS COURT.

In this class of cases—fraudulent and unfair competition—the courts have had to deal with a great variety of facts and circumstances, and in some cases certain specific facts and circumstances were present and were emphasized, while in other cases those facts and circumstances were not present, or if present, were not discussed for the reason that it was not deemed necessary to refer to them specifically in the decision of the case. But, as heretofore said, all the cases recognize the cardinal rule enunciated by this Court that no one shall by imitation or any unfair device, or by any artifice induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his product. In some of the cases the Courts have referred to the fact that the defendants therein were corporations—artificial persons—having an artificial name, invented for the purpose of unfair competition, and the fact that one or more of the corporators bore a patronymic, which was intentionally selected, adopted and used by the corporation for the purpose of misleading and de-

ceiving the public and confusing the identity of the products and the business of the two concerns, and have said that the fact that such name was that of a corporator could not justify the appropriation and use thereof.

Where the word used by the defendant, as the name or part of the name of his business and product, has previously thereto come to indicate the source of manufacture of particular devices or the products of another, the Courts for the purpose of determining whether defendant is guilty of unfair competition will carefully consider and scrutinize all the facts and circumstances attending the selection and adoption of the name, by the defendant, and the manner of its use. In several of such cases the Courts have enunciated the proposition that "a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name, in that business, the name of one of their number when it appears that such name has been intentionally selected in order to compete with an established concern of the same name, engaged in similar business, and divert the latter's trade to themselves by confusing the identity of the products of both and leading purchasers to buy those of one for those of the other. . . . . The corporators chose the name unnecessarily, and having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the Complainant." Other Courts have laid down substantially the same doctrine.

Higgins Co. *vs.* Higgins Soap Co., 144 N. Y., 462.

DeLong *vs.* DeLong Co., 89 Hun, 399.

Garrett *vs.* T. H. Garrett & Co., 78 F. R., 472.

LePage Co. *vs.* Russian Cement Co., 51 F. R., 941.

Clark Thread Co. *vs.* Armitage, 67 F. R., 896, affirmed 74 F. R., 936.

Valentine Meat Juice Co. *vs.* Valentine Extract Co., 17 Patent and Trade-Mark Cases, 673.—Law Times Reports vol. 83, p. 259.

Peck Bros. & Co. *vs.* Peck Bros. Co., 113 F. R., 291, 302.

R. W. Rogers & Co. *vs.* Wm. Rogers Mfg. Co., 70 F. R., 1019.

International Silver Co. *vs.* Rogers, 110 F. R. 955.

International Silver Co. *vs.* Wm. C. Rogers Co., 113 F. R., 526; affirmed 118 F. R., 133.

Fuller *vs.* Huff, 104 F. R., 141.

In every case however, whether the name, corporate or otherwise, was intentionally selected in order to inaugurate an unfair competition and divert anothers trade by confusing the identity of the products is an *inference of fact* to be drawn from all the circumstances and evidence in the record.

(A.) It is alleged that the decision of the Circuit Court of Appeals of the second circuit in the case of National Starch Mfg. Co. *vs.* Duryea (79 Fed. Rep., 651, 101 F. R., 117) is in conflict with the decision of the Court in the case at bar.

In the Duryea case it appeared that Duryea & Co. was a firm, composed of two sons of Hiram Duryea, one of the original founders of the Duryea Starch business and two other persons, and that Hiram Duryea furnished *all* the capital for the firm. It also appeared that Hiram Duryea, during the progress of the suit and before the case came to final hearing, acquired the ownership of the *entire* business.

It was conceded by plaintiff that Hiram Duryea had a right to enter directly or indirectly into the starch business at the time of the commencement of the action, and had a right to permit his name to be used in the new enterprise.

The evidence in the case showed that the defendants simply used the name Duryea & Company, and

had not in any way *garnished* the use thereof. They had simply designated their starch "Laundry Starch" and "Pure Corn Flour" prepared by Duryea & Co., and had never used the word "Duryea" as a designation or part of a designation for their goods. On the appeal from the order granting an injunction *pendente lite* (79 Fed. Rep., 652) the Court said:

"It cannot be denied that, by continuous and rightful use for forty years, the name Duryea's Starch" had become identified with its source of manufacture, and that an attempt by persons by the name of Duryea, or of any other name, to put upon the market their own product under the name "Duryea Starch" could be suppressed.

Inasmuch as defendants have not called their starch by this well-known name, and have not simulated the labels on their packages to those long used by the manufacturer at Glen Cove, the question is whether the defendants have made such an unnecessary and unfair use of the name of Duryea as to deserve the unfavorable criticism of a Court of Equity."

The Court held that defendants had not made an unfair use of the name "Duryea" and should not be enjoined.

In the case of Walter Baker & Co., vs. Sanders, 80 Fed. Rep., 889, 895, the Court of Appeals of the Second Circuit referred to and distinguished the Duryea case from the Baker case, and held that the defendant might not use the surname Baker so as to announce upon labels and advertisements that the goods he sold were "Baker's Chocolate."

(B.) The case of Baker vs. Baker, 115 Fed. Rep., 297, 300, a decision by the Court of Appeals of the Second Circuit, is referred to in Petitioner's Brief. In its facts that case is clearly distinguishable from the case at bar. The defendant was a corporation of the name "Wm. H. Baker."

The Court said, "If the name had been selected unnecessarily and for the purpose of illegitimate

competition with Complainant, we should not hesitate to enjoin it . . . . . but it was selected without any element of bad faith or unfair use, it was not a new name, and it represented a widely known concern engaged in a large business, which had acquired a valuable good will. For reasons of convenience the owner concluded to reorganize the concern as a corporation and desiring to preserve the good will, he chose the name with which the good will was identified. He intended to remain the owner of the concern and has remained its owner as before.

As regards the Complainant, it is wholly immaterial whether the business is conducted as the name of a corporation or that of an individual by the same description." This was simply the case of an individual who had traded under his own name, Wm. H. Baker, and organized a corporation to carry on his own business under his own name. Manifestly there is no conflict between the Duryea and Baker cases and the case at bar. In the Baker case the defendant did not designate its goods as "Baker's Chocolate," but had adopted as a trademark the words "Justice Brand" and a figure of justice, and had otherwise differentiated his product from complainants'.

In the case at bar the proofs show that the Petitioner, the Remington-Sholes Co., (now Fay-Sholes Co.) had adopted and was using not the name of any individual but an artificial name invented for a purpose: that the corporation was organized by a body of associates in which Franklin Remington had only one-twentieth interest; that is, owned 150 out of 3,000 shares of capital stock, and that these Remingtons had no prior skill in or knowledge of the typewriter business and were unknown to the public in connection with that industry. The proofs further show that the Petitioner, had designated and advertised its machine as the "Remington-Sholes" typewriter, that it had used the name "Remington" both in its corporate name and upon

its machines, and garnished its use of the name Remington in its advertisements and by word of mouth, in such a way as to lead the public to believe that its product had been made by the Remington Company (Respondent's predecessor) whose name was a by-word for good workmanship the world over, and that it was either the successor or a branch of the old Remington concern.

(C.) The case of American Cereal Co. *vs.* Eli Pettijohn Cereal Co. (72 Fed Rep., 903, affirmed 76 Fed. Rep., 372,) decided by the 7th circuit, is cited by Petitioners (p. 27). In that case a preliminary injunction was granted which on motion of defendant was dissolved. The product in question was first manufactured and put upon the market by one Eli Pettijohn, defendant's predecessor in business, and one of the organizers and incorporators of Defendant Co., under the name "Pettijohn Rolled Wheat." Prior to the organization of the Defendant Company it was sold under various names by Eli Pettijohn and his son, or by one of them as:

"Pettijohn Breakfast Gems."
"Pettijohn Breakfast Pearls."
"Pettijohn Breakfast Food."

The name "Pettijohn" was first associated with the product by Eli Pettijohn (the father), who was engaged in the manufacture and sale of the product in the State of California for about fifteen years. During all of these years, the name "Pettijohn" was applied to this product, whether manufactured by the father or the son, or by the successors of both or either of them. The plaintiff claimed the title to the name as applied to this product through grant by the son, and the defendant through grant by the father. It being doubtful whether the father ever parted with his right to such use to his name, and whether the son ever acquired the *exclusive* use thereof, in the manufacture and sale of the breakfast food, and whether they were not both entitled to use the name Pettijohn as tenants in

common, the Court of Appeals held that the complainant's title to the name was not sufficiently clear to warrant the issuance of a preliminary injunction. It is manifest that in this case the right and title of the defendant to use the name Eli Pettijohn was as good, if not better, than that of the plaintiff. The evidence in that case showed that Eli Pettijohn was the originator and *pioneer* in the manufacture and sale of "Pettijohn Breakfast Food," and that at the time of the organization of defendant corporation, he had an established business and good will that had been carried on by him for upwards of fifteen years. He caused a corporation to be organized to take over and carry on this *existing business* in which he continued to be actively engaged. To this corporation he gave his full name, "Eli Pettijohn."

Manifestly these facts plainly distinguish this case from the case at bar.

(D.) The paragraph in the opinion of Mr. Justice Bradley in Celluloid Mfg. Co. *vs.* Cellonite Mfg. Co. (32 F. R. 94) from which the excerpt in Petitioner's Brief is quoted (p. 25) reads as follows:

"As to the imitation of the Complainant's name. The fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the name of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the Complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the Complainant's name. That would be too gross an invasion of the Complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a

similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law. Judged by this standard, it seems to me that, considering the nature and circumstances of this case, the name "Cellonite Manufacturing Company" is sufficiently similar to that of the "Celluloid Manufacturing Company" to amount to an infringement of the Complainant's trade-name. The distinguishing words in both names are rather unusual ones, but supposed to have the same sense. Their general similarity, added to the identity of the other parts of the names, makes a whole which is calculated to mislead."

The learned Justice in determining the question whether the defendant's name was a simulated one, which was obnoxious to equity, applied the test of "a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer."

But he pointed out what similarity was sufficient, "*has to be determined in each case by its own circumstances.*"

It is not seen that there is any conflict between the proposition quoted from the opinion of Justice Bradley, in the case cited, and any proposition enunciated or held by the Court of Appeals in the case at bar.

(E.) In the case of Continental Insurance Co. *vs.* Continental Fire Ass'n. (96 F. R. 846, affd. 101 Fed. R. 255, Referred to in Petitioner's Brief p. 29) the Court held that the word "Continental" being a geographical term was *publici juris*, and that the Complainant could acquire no exclusive right to the use thereof. There being an absence of proof of any fraudulent intent or conduct on the part of the defendant, or that the public had been deceived by any similarity between the names, a preliminary injunction was refused. It is to be noted that in this case the Court recognized the familar rule that "Relief by injunction is sometimes granted in cases where the party enjoined is using as a trade-name

a term which is geographical or descriptive in character and, therefore, could not be exclusively appropriated by the party securing relief."

The Court pointed out that relief is granted in this class of cases not because the complainant had the exclusive right to appropriate the word or term, but because the defendant had fraudulently and deceitfully adopted the words, and similar methods of use, with the purpose and intention of attracting customers away from his rival to himself.

The foregoing authorities are all those decided by the U. S. Circuit Courts, which it is alleged are in conflict with the decisions of the Court in this case or with one another.

It is submitted that a careful examination of these cases fails to disclose any lack of harmony among them in respect of the legal principals therein involved.

(F.) The other cases cited by the learned Counsel for Petitioners, as in conflict with the decisions in the case at bar, are decisions of sundry State Courts.

Any conflict that may exist between decisions of the Courts of the various States among themselves, or between the decisions of State Courts and the Federal Courts, (in the absence of any Federal or Constitutional question), furnishes no ground for this Court to issue the writ prayed for in the petition.

No decision of this Court could set at rest any conflict, (if such there be), between the State and Federal tribunals in this class of cases.

It is scarcely necessary to remind this Court of sundry instances in which it's decisions and those of the State Tribunals conflict. But we submit, that there is no such conflict here as alleged.

(1.) The case of Meneely *vs.* Meneely (1 Hun. 673, affirmed 62 N. Y., 427) decided by the Supreme Court and Court of Appeals of N. Y. State, has been pressed upon the attention of the Court here as an authority repugnant to the decisions in the case at bar. In that case the defendants Clinton H. Meneely

and Geo. H. Kimberly were sued jointly as partners trading under the firm name of Meneely & Kimberly. The Court below issued an injunction prohibiting the use by defendants of the name Meneely *in any way.*

The Court found that defendant had not used, in business, the firm name or any part of the name by which the plaintiff had theretofore been known to the public, nor had defendants designated their product as "Meneely Bells" or "Meneely-Kimberly Bells"; nor had there been any attempt by any act or artifice to appropriate the good will of the old business to which plaintiffs had succeeded. On this state of facts the Court of Appeals held (1) that the injunction granted by the Court below was too broad in that it enjoined Clinton H. Meneely, an individual, from using his patronymic "*in any way*", and (2) there being no evidence that defendant had resorted to any artifice or contrivance to produce the belief or make it appear that the establishment of the defendant was that of plaintiff or connected therewith, an injunction *was unwarranted.*

This case is referred to by the N. Y. Court of Appeals in Chas. S. Higgins Co. *vs.* Higgins Soap Co., 144 N. Y. 462 as an authority upon the proposition that any person may use in his business his family name, provided he uses it honestly and without artifice or deception; but that Court did not find anything in the Meneely case that was in conflict with any of the propositions enunciated or the conclusions reached in Higgins case.

(2) Two other N. Y. cases are referred to in the brief submitted by petitioners—The Scott Stamp & Coin Co. Ltd. *vs.* T. W. Scott Co. Ltd. (15 N. Y. Supp., 325), and Employers Etc. Co. *vs.* Emyloyers Etc. Co., 10 N. Y. Supp., 845. Also The Deposit Co. *vs.* Mutual Deposit Co., 66 S. W., 1032, a Kentucky case, and Monarch *vs.* Rosenfeld, 39 S. W., 236.

All these cases are so clearly distinguishable in their facts from the case at bar that it is not deemed

necessary to trespass upon the time of this Court to discuss them in detail.

Suffice it to say that both of the New York cases were decided long prior to the Higgins case (*supra*), and the De Long cases (32 N. Y. Supp., 203; aff. 35 N. Y. Supp., 509), and hence any expressions of opinion therein that are in conflict with any legal conclusions reached in the De Long and Higgins cases must be regarded as overruled.

In view of the decision of the Court of Appeals of New York State, in the last cited case, it cannot be said that there is any conflict on this subject in the law of that State of which this Court can take cognizance.

In re. Woods, Petitioner, 143 U. S., 202, 206.

(3) The case of S. Chivers & Sons *vs.* Chivers & Co. Ltd., 25 Trade Mark Red., 289, (cited by Petitioner, p. 30), is wholly unlike the case before the Court here. An examination of the facts in that case will disclose (1) that the plaintiff failed to establish that the name "Chivers" had acquired a *secondary* meaning in the trade as denoting the plaintiff's jellies, (2) that the defendant was the successor in business of an *old concern* which had been long engaged in the jam trade, (of which jellies was a by-product), under the name S. Chivers & Co., and (3) that defendant had not designated its product as "Chiver's Jellies," and had resorted to no artifice or act calculated to produce confusion in the mind of the public (See Kerly on Trade-Marks, 2d Edition, pp. 506–7).

(4) Another case referred to in Petitioner's Brief (p. 27) is Hazelton Boiler Co. *vs.* Hazelton Tripod Boiler Co. (142 Ill., 494) decided by the Supreme Court of Illinois.

The facts in that case are not analogous to the case at bar, and the doctrine of that case, as was clearly pointed out by the learned Court of Appeals of Seventh Circuit in the Peck Bros. case (113 F. R.,

291, at pp. 299–302), is not in accord with the decisions of the Federal and other State Courts.

(G) THERE IS NO CONFLICT BETWEEN THE DECISIONS RENDERED IN THIS CASE AND THE DECISIONS OF THE COURT, WHICH HOLD THAT A PERSONAL NAME CANNOT BE EXCLUSIVELY APPROPRIATED AS A TECHNICAL TRADE-MARK.

The learned counsel for petitioners earnestly argue in their brief that inasmuch as the name "Remington" was a family name, it was incapable of exclusive appropriation, and, therefore, that the complainant was not entitled to an injunction in this case restraining its use by defendant (citing various cases at p. 9).

The contention of counsel here is a confusion of the bases of two classes of suits—those of infringement of technical trade-marks and those for unfair competition, or perfidious dealing in trade. Suits of the first class rest upon a proprietary interest in or ownership of a trade-mark. Suits of the latter class are founded upon the damage to the trade of complainant and injury to the public by the fraudulent passing off goods of one manufacturer as those of another. In the former class of cases an exclusive right to the trade-mark is indispensable to the cause of action. In the latter no proprietary or exclusive interest in the words, names or means by which the fraud is perpetrated, is requisite to maintain a suit to enjoin them. It is sufficient that the complainant is entitled and has an interest in the good-will of a business, and that this interest or good-will will be injured or rendered precarious by the palming off, by the words, names or symbols adopted, of the goods of another as complainant's. The distinction was tersely and lucidly pointed out in the opinion of the learned Justice in the case of Singer Mfg. Co. *vs.* June Mfg. Co., 163 U. S., 171, 183, 184.

It is also recognized in the cases of Brown Chemical Co. *vs.* Meyer, 139 U. S., 540, 545; Elgin National Watch Co. *vs.* Illinois Watch Case Co., 179

U. S., 665, and McLean *vs.* Fleming, 96 U. S., 245. This is not a case for the infringement of a technical trade-mark. It is *an action* to *restrain unfair competition in business.* For this reason it was not necessary for the complainant here to establish a proprietary or exclusive right to the name "Remington."

It was sufficient to establish an exclusive right to the use of that name as against the defendant, the Howe Scale Co., or its principal the Remington-Sholes Co.

"THERE ARE CASES WHERE THE RIGHT TO USE A NAME TO DESIGNATE A PRODUCT IS SO QUALIFIEDLY EXCLUSIVE THAT THE RIGHT TO THE PROTECTION OF ITS USE AGAINST INFRINGEMENT BY OTHERS RESTS UPON THE GROUND THAT THE USE BY THEM IS AN UNTRUE OR DECEPTIVE REPRESENTATION."

Koehler *vs.* Sanders, 122 N. Y., 65, 74.

Illustrations of this principle are found in Newman *vs.* Alvord, 51 N. Y., 189, 195, cited with approval by this Court in Canal Co. *vs.* Clark, 13 Wall, 311; McAndrews *vs.* Bassett, 10 Jur. (N. S. 540); Croft *vs.* Day, 7 Beav., 88, cited by this Court in 139 U. S., 542; Metzler *vs.* Wood, 8 Ch., 606; Montgomery *vs.* Thompson (1891) App. Cas., 217, 220; Seixo *vs.* Provezende 1, Ch. App., 192, 194; Lee *vs.* Haley, 5 Ch. App., 155, 161; Knott *vs.* Morgan, 2 Keen, 213; Wotherspoon *vs.* Currie, L. R., 5 H. L., 508, 522; Reddaway *vs.* Banham (1896) App. Cas., 199, 204, approved by this Court in 179 U. S., 665; Brewery Co. *vs.* Powell (1897) App. Cas., 710, 716; N. Cheshire Brewery Co. *vs.* Manchester Brewery Co. (1899) App. Cas. 83; American Waltham Watch Co. *vs.* U. S. Watch Co., 173 Mass., 85.

The evidence in the record and findings of the Court below establish that complainant's right to use the name "Remington" is exclusive as against the defendant.

Pet., pp. 53, 54, 72, 73.

IV. Petitioner's counsel criticise in their brief the form of the injunction order, as being too broad, in that it restrained the Howe Scale Company from the use of the personal name "Remington" (p. 13.)

It must not be overlooked that in this case the injunction only went against the Howe Scale Company, which in its own right made no claim to the word "Remington," and at the time the injunction was issued had permanently retired from the typewriter business. No injunction has been issued against the Remington-Sholes Co. (now Fay-Sholes Co.).

While the complainant's right to an injunction as against this latter company on the state of facts presented here has been determined by the decisions of the Courts below, the form of injunction to be issued by the U. S. Circuit Court for the Northern District of Illinois will be settled by that tribunal according to the circumstances existing when it is issued.

The form of an injunction order in any particular case necessarily depends on the circumstances.

> Montgomery *vs.* Thompson, 41 Ch. Div. 35 on appeal (1891) App. Cas., 217.
> Wm. C. Rogers Co. *vs.* International Silver Co., 118 Fed. Rep., 133, 134.

It is scarcely necessary to point out that neither Franklin Remington nor any other individual of the name Remington has been enjoined herein from using his own name in his own business. Both the Howe Scale Company and its principal, the Remington-Sholes Company, are artificial persons, and the name "Remington-Sholes" as used by them, to quote the words of the learned L. J., in Valentine Meat Juice Co. case (British Ct. App. 17 R. P. C., 684), "was not the name of any man. It was an artificial name, invented for a purpose." The Court

below having reached the conclusion that the name "Remington" had been intentionally selected, *malo animo*, in order to compete with the respondent and to divert its trade to petitioners, by confusing the identity of the products of both to the injury of respondent, and was being used for that purpose, was correct in suppressing such fraudulent use. In the following cases an injunction similar in form to that of the case at bar was awarded.

Montgomery *vs.* Thompson, 41 Ch. Div. 35 on appeal (1891) App. Cas., 217.

Wotherspoon *vs.* Currie, L. R. 5 H. L., 508. Valentine Meat Juice Co. Ltd. *vs.* Valentine Extract Co. Ltd., and others, 17 R. P. C. British Ct. App., 673, 688.

Pinet *vs.* Maison Louis Pinet, 15 R. P. C., 65, 67 L. J, Ch., 41.

Newman *vs.* Alvord, 51 N. Y., 189, 195.

and many other similar cases.

V. The Court below found as a fact that the name "Remington," which was selected, adopted and used in petitioner's corporate name and upon its machines was not fairly or honestly bestowed thereon, but was adopted and used for the purpose of filching the good will of complainant's business.

We do not deem it necessary on this application to discuss at length the evidence on which the Court below predicated its findings of fact. Suffice it to say the proofs fully support the above conclusion, and it must be treated as presumptively correct in this Court. We briefly refer to certain of the questions of fact, discussed in Petitioner's Brief.

Various reasons are assigned in Petitioner's Brief why it was reasonable and fair for the Remington-Sholes Typewriter Co. and the Remington-Sholes Co. to adopt the name Remington-Sholes as its corporate name (pp. 13–14.)

1. The first reason assigned is that both Remington and Sholes had labored incessantly for many months in the production of the machine; Sholes contributing his inventive genius and Remington furnishing the funds to re-construct the machine. It has already been pointed out that the evidence shows that the model machine had been produced and was complete and ready for manufacture by "The Z. G. Sholes Co." when the Remingtons acquired their interest therein, and that no material changes were made in this model, after the Remingtons acquired their interest and prior to the organization of the Remington-Sholes Typewriter Co.

Subsequent to the organization of that company, in May 1894, some changes in and additions to the machine were made in preparing it for sale. The labors of Franklin Remington prior to the organization of the company consisted in his efforts, already referred to, in exploiting the model and the improvements therein. The evidence established clearly, that the machine was the *entire* product of Sholes, and was marked and known as "The Z. G. Sholes" machine until November 18, 1893. There is no basis in the evidence for the statement in petitioner's brief (p. 14), that the machine was "reconstructed" prior to the organization of the Remington-Sholes Typewriter Co.

2. The second reason assigned is, "because it (the corporation) was to manufacture a machine which was distinctly the product of and owed its existence to both Remington and Sholes. This reason is in substance the same as the first and is not supported by the evidence in the case. It may be well to note at this juncture *that no machine of any kind other*

than the model was made prior to the formation of the Remington-Sholes Co.

3. The third reason assigned is (brief p. 14) "because it is the almost universal custom in the typewriter trade to identify by the same name the corporation and the machine it is to manufacture." This is an inaccurate statement of fact. The answer herein shows that many machines do not bear the same names as the concerns that manufacture them (see answer p. 22.) In this connection it may be said that when the name of the model machine was changed from "The Z. G. Sholes" to the "Remington-Sholes" the petitioner's predecessors unnecessarily departed from the alleged custom.

4. The fourth reason assigned (brief p. 14) that "the public would be interested in the coming together of these sons," has no solid foundation and is largely sentimental. The evidence establishes the fact that Sholes' father did not alone originate the pioneer model typewriter, but that it was the joint product of several inventors.

5. The fifth reason assigned for the adoption of the name "Remington" is because the family name of Remington had a world-wide reputation in many lines of trade (brief p. 14) "other than that and distinct from the typewriter business." It may be answered that the respondents have never objected, and do not now object, to Mr. Remington or the Remington-Sholes Co. using the name "Remington" *ad libitum* in any lines of trade other than and distinct from the typewriter business.

The sole question in this case was whether the acts done either in organizing the Remington-Sholes Typewriter Co. and Remington-Sholes Co., or in the prosecution of their business, of the manufacture and sale of typewriting machines invaded any right of the respondent or constituted unfair competition in business.

It was conceded by petitioners, in the Courts below, that respondent had a world-wide reputation

in the typewriter business when the Remington-Sholes Typewriter Co. was formed. It was not disputed that respondent had succeeded to the whole typewriter business of E. Remington & Sons (corporation), including the good will and trademarks thereof, and had largely improved the quality of the machines and volume of business. Any reputation or good-will connected with the old concern was vested in Respondent. It is to be borne in mind that none of the older Remingtons were *personally* engaged in the typewriter business, and that Franklin Remington's father had no knowledge or skill therein, but was always *hostile* to the business during the time it was carried on by the corporation, E. Remington & Sons.

6. An additional reason assigned for the adoption and use of the corporate name "Remington-Sholes" is, that the Remingtons have a right to use their names like ordinary property, and that they had a right to bestow such names in the usual way upon a corporation of their own creation in which they held a large part of the stock, etc. (Brief, p. 15.)

The evidence in the record shows that the corporation was chiefly promoted and organized by Fay (Rec., p., 408) who was president and principal stockholder. Subsequently he, together with Head, furnished the working capital for the company. Neither of the Remingtons nor Sholes contributed any funds to the organization of the company, or paid any cash for their stock. In the reorganization of the company neither Carver Remington nor Sholes retained any interest therein, and Franklin Remington was given only 150 shares of the *common* stock. Franklin Remington and Sholes were employees of the company, and received compensation for any time and energies which they devoted to the service of the Company. Without regard to the question whether an individual has the right to bestow his name fairly and honestly on a corporation of his own creation, and which represents his business and capital, it is substantially conceded by

petitioner's counsel in their brief (p. 23), that *he may not do so dishonestly or to perpetrate a fraud.* The vice of the reason, assigned here by petitioner's counsel, is that it assumes in petitioner's favor the disputed question of fact found against them by the Court below, to wit, that the name Remington-Sholes Co. was not taken fairly, honestly or for a legitimate purpose by the corporators of the Illinois corporation. These contentions were raised and strenuously urged by Petitioners in the Courts below, but the Courts found against the Petitioners.

7. While it is true that many typewriting machines bear the name of the inventors or manufacturers (See Petitioner's Brief, p. 15,) it is equally true that many do not. (See answer, p. 22 .)

There is no established custom in the premises. If there exists any such alleged custom, the correct name for Petitioners machine would have been either "The Z. G. Sholes" typewriter, the name of the alleged "sole inventor" (Pet., p. 14) or "Fay-Sholes" typewriter, the names of (1) the principal promoter, stockholder and official and (2) the sole inventor of the machine.

The learned Circuit Court of Appeals in the prevailing opinion said, in referring to selection of the name Remington Sholes, "we have no doubt it was an intelligent choice. Those who selected it well knew that the use of the name Remington in connection with a typewriting machine would help to sell it as the name of Brown or Peterson would not." (Pet., p. 65)."

Sholes testified in substance, that he changed the name of the model from "The Z. G. Sholes" to "Remington-Sholes" because the name Remington had been used in connection with Respondent's typewriter business and machine, and that if names of the Remingtons had been *Smith or Peterson* he would not have made the change of name (Record, pp. 425-26.)

It also appears in the testimony in the case that Fay, directly after the corporation was organized

and before its product had been manufactured or placed upon the market, or the name "Remington-Sholes" was made known to the public in connection therewith, regarded the name "Remington" as of material advantage in selling Petitioners machines, (Rec., pp. 447–448,) and that after the machines had been placed upon the market he did not consider *the machine itself of any considerable value.* He said that the only value that he attached to it was that it bore the name *Remington-Sholes.* (Rec., p. 419). Manifestly the only part of the name which at that time was of any material value was the name Remington, which had then acquired a world wide reputation in connection with the typewriting machines and business of Respondent. Respondent's Counsel frankly conceded, in the Courts below, that the choice of the name was "an intelligent one" and that both Fay and Head at the time of its adoption by the Illinois corporation agreed with Sholes that the name "Remington-Sholes" was a good combination and furnished "a good talking point."

In view of the foregoing facts, and others of similar nature disclosed in the testimony, we submit that the conclusions reached by the learned Court of Appeals were fully justified.

8. The question of whether under certain circumstances a corporation may be considered and treated as a partnership is not material or pertinent to the issues raised here. The question here is whether a body of associates or promoters can adopt for the name of a corporation and its product the trade-name of an established concern, whose product had acquired a world-wide reputation in connection therewith, for *the purpose of filching the good will of its business.* The fact that this name happened to be the patronymic of one of the Petitioners incorporators, is, as we conceive not material.

Higgins Co. *vs.* Higgins Soap Co., 144 N. Y., 462, 468.

9. The constant iteration in Petitioners brief that the business of the Remington-Sholes Typewriter Co. and Remington-Sholes Co. was Franklin Remington's business is contrary to the proofs in this case. He was never more than a minority stockholder in the corporation.

VI. Much emphasis is laid in Petitioners brief on the alleged decisions of certain Courts in Germany (P. 35.)

An alleged decision of the German Courts was pleaded as a defense by appellant, (R. V. I. pp. 29, 30 Sub-division XII), but it was not introduced in evidence or any proof made in respect thereto. The Appellant gave notice upon the record that at the hearing of the cause it would refer to said decision. *It is scarcely necessary to state that allegations without proofs requisite to support them are wholly unavailing.* That action was a civil proceeding by the firm of Glogowski & Co. of Berlin, against one Henry Newald of the same City, under the CIVIL CODE and TRADE-MARK LAWS of the German Empire. At the time the action was prosecuted, Glogowski & Co., were the exclusive resident dealers for Germany of Respondent's machines, and Newald was a dealer selling the so-called Remington-Sholes machine in Germany. Glogowski & Co. being the resident dealers of Respondent's machines, under the German Trade-Mark Law, registered the name "Remington" as a trade-mark for the goods they were selling. Newald was selling the machines of the Remington-Sholes Typewriter Company, with the name of that concern upon them.

IT WAS AN AFFIDAVIT CASE; that is to say, no witnesses were examined in Court, or depositions taken in the usual manner, nor were any of the affiants cross-examined. The consequence was that while the *Plaintiff's* case was meagerly and imperfectly presented, the defendant Newald was furnished with sundry affidavits by the Remington-

Sholes Typewriter Company, which not only stoutly denied the Respondents right to use the name "Remington" upon or in connection with the sale of its machines, but also contained many gross misstatements of fact. The Court ultimately came to the conclusion that inasmuch as the defendant Newald dealt exclusively in the goods of an American firm, which had the name "Remington-Sholes Typewriter Company" upon them, he could not, *under the special provisions of the German Trade-Mark Law, and in view if the convention between the German Empire and the United States*, be prevented from selling the typewriting machines of the so-called American firm, "Remington-Sholes Typewriter Company," in Germany: Obviously the *parties* to that proceeding, the *issues* therein, and the *law* applicable thereto were *totally* different from those in the case at bar. THE DECISION OF THE COURT IN THAT CASE CANNOT AVAIL THE DEFENDANT OR ITS PRINCIPAL AS AN AUTHORITY HERE."

First, because the question there, was one which arose under the Trade-Mark Laws of *Germany*, which are wholly unlike those of this country. *Second*, because no such state of facts was presented in that case as is disclosed in the case at bar. *Third*, because it has been decided that an adjudication in *Germany* like that set forth in Appellant's answer, is of no force here, for the reason that foreign adjudication as respects *torts*, are not binding upon the Courts in this country, and the granting of an injunction depends upon circumstances which vary in different jurisdictions; and *lastly* because the parties in the *German* case were other and different from those in this action."

Whart. Confl. Laws, Secs. 793, 827.
Hohner *vs.* Gratz, 50 Fed. Rep. 369.
City of Carlsbad *vs.* Kutnow, 68 Fed. Rep. 794.
S. C. App., 71 Fed. Rep. 167.

This German decision furnishes no ground for the interposition of this Court herein.

VII. A contention is made in Petitioner's Brief (pp. 36–7, petition p. 17) that the Courts below erred failing to pass upon the alleged error of the lower Court in admitting certain evidence introduced by Respondent, and in failing to tax it with the cost thereof.

It is true that a motion was made by Petitioners in the Circuit Court that certain evidence taken by Respondent "be suppressed or stricken from the record." Rec. Vol. III, pp. 1440–42.

But no motion was made in any court to tax the costs of this evidence against the Respondent herein. No such request was made in Petitioner's brief filed in the Circuit Court, and no such request was made in the Circuit Court of Appeals.

It was, in substance, nothing more than a motion to disregard certain evidence. And under well settled practice the Court had no power to suppress or strike from the record testimony taken in the Court below.

Blease *vs.* Carlington, 92 U. S. 1.

The Circuit Court overruled the motion and held that the testimony was relevant (Pet., pp. 48–49). It does not appear that the learned Circuit Court of Appeals predicated its decision herein on any portion of this evidence.

The decree entered in the Vermont Court, after the decision of the Circuit Court of Appeals, was in strict accordance with the mandate issued out of the latter Court, which embodied a copy of the original decree of the Circuit Court. (Answer, p —.)

In view of the fact that neither party had wholly prevailed in the Circuit Court of Appeals, that Court modified the decree of the Court below "without cost," leaving undisturbed the question of costs in the Court below.

VIII. Petitioners contend that the order of the Court made in the suit brought by Respondent against the Fay-Sholes Co., in the Northern District of Illinois, making the determination of the Court of Appeals, in the suit at barres adjudicata in the Illinois case as to all issues involved therein, except as to an accounting, presents a further reason why the present petition should be granted.

(Brief, p. 36; Pet., pp. 11 and 12, p. 18.)

This order was entered pursuant to *stipulation* of defendant in that suit. It would seem plain that, in view of this stipulation and order of the Illinois Court, no danger of any multiplicity of suits exists, and that all issues between the parties to that action have been finally determined except matters arising on an accounting.

In this connection it is to be noted that the Remington-Sholes Co. (now Fay-Sholes Co.), *voluntarily* assumed the defence of the Vermont suit, employed its own counsel, examined and cross-examined through its own counsel, and has presented its defence both in the Circuit Court and the Court of Appeals of the Second Circuit.

The case has, from commencement to conclusion, been treated as one against the Remington-Sholes Co., in so far as the questions at issue herein are concerned.

Manifestly it has had a full and ample opportunity to present its case.

IX. An excerpt is made in Petitioner's Brief from the prevailing opinion of the Circuit Court of Appeals and from which it is sought to draw the erroneous inference that a majority of that Court held that there was no sufficient evidence in the record that the Petitioners had been guilty of any fraudulent acts or unfair competition in this case, except that to be inferred from their mere adoption of the name Remington.

An examination of the prevailing opinion as a whole will establish that this contention is without foundation.

The sentence quoted when read in the light of the subsequent statements in the opinion shows that the learned Judge then had in mind that the crucial question in the case was whether the selection, adoption and use, by the Illinois corporation, of the name "Remington" as a part of its corporate name and of the designation of its product were fairly bestowed and used (Pet., p. 59).

X. Stress also has been laid by petitioners on some differences in the design and finish of their machines and those of the respondent.

It is true that there were some differences in appearance, between Respondent's and Petitioner's machines, but these differences would escape the attention of the ordinary unsuspecting purchaser of writing machines, who is not familiar with *details* of structure, and if he noted them at all, would be led to suppose *that the differences simply indicated different models or styles of writing machines made by the same manufacturer.* The proofs in

this case show that purchasers ordinarily are of that class, who are unacquainted with the *physical* characteristics of the machines; that it is the *exception* that the buyer possesses any *information in detail* of the typewriter, and that it is the *rule* in the *larger* cities that the *business man* does not even examine the machine which he purchases. *Moreover in this country, very few buyers are operators.*

A large class of purchasers therefore, both in this country and abroad, buy the machines with no information except what is communicated to them by the word "Remington" in connection with the word "typewriter". The purchaser does not and is not bound to study or reflect. He acts upon the moment. He is without opportunity of comparison. He relies upon the name and repute of the machine. These facts must be taken into account by the Court and also the fact that the market is not local, but world-wide. The contention of Petitioners that their machines were in finish and outward appearance unlike Respondent's, and, therefore, that the public and purchasers of typewriting machines could not be misled was practically abandoned and not regarded as of force in this case, because the proofs show that the Petitioners put upon the market a writing machine which in *external appearance, finish and design* more nearly resembled the machines of Respondent than those first manufactured and sold by them. *This machine was japanned in black, and was designated the No. 6 "Remington-Sholes" or "Rem-Sho".*

In this connection the attention of the Court is called to the fact that Respondent's "Remington No. 6 Machine" was and is the one principally sold and used in this country. Either Petitioners did not regard the *mere external appearance and finish of their machines* as of any consequence, in so far as the question of infringement was concerned, or else they grew bolder, and their desire for gain induced them *to more closely simulate the design and finish of*

Respondent's machines and to designate their *new* model the "Remington-Sholes" (Rem-Sho) No. 6. It will be observed that in one case it was the "Remington No. 6" and in the other the "Remington-Sholes", or "Rem-Sho No. 6".

But conceding for argument's sake that Respondent and Petitioners machines were somewhat different in finish and external appearance, nevertheless the name "Remington" had been so identified with the business of Respondent as to inform the public that that name upon writing machines meant that they were its product, and since Petitioners adopted and used that name, it was not material that their machines had not also the *particular* design and finish in which Respondent's typewriters were presented to the public.

Fuller *v.* Huff, 104 Fed., Rep. 141;
Hier *v.* Abrahams, 82 N. Y., 519;
Le Page Co. *v.* Russia Cement Co., 51 Fed., Rep. 941, 945.

XI. The Petitioners allege that it was the practice to mark their machines with the words "Remington-Sholes" and with the word Chicago; that it had used those words in its advertisements, etc., and thereby its machines had become distinctly known and were differentiated by the public from those of respondent's manufacture.

Now, while the proofs show that the words "Remington-Sholes" or Rem-Sho, and the word "Chicago" appeared on its machines, and in its advertisements, there is no proof that the purchasing public thus recognized or differentiated its machine from Respondents. In the first place, it is to be observed that the hyphenated name "Reming-

ton-Sholes," and "Remington-Sholes Co." which are alleged to have been stamped upon all machines and to have appeared in Petitioner's advertising media, are *the very words here in controversy;* that is to say they contained Respondent's trade-name or designation "Remington," combined with the suffix "Sholes." *This is therefore, not the case of a manufacturer bearing a non-infringing name,* who stamped it on his goods, *but is one where both the designation of the goods and the manufacturers' name stamped thereon* infringed upon Respondent's rights. In other words the stamping of the corporate name "Remington-Sholes Co." upon the machines was *an aggravation and not a justification.* Both names indicated Remington connection, and implied the original manufacturer.

It appears, in the testimony here, that Respondent has for many years carried on an extensive business in Chicago and in the territory adjacent thereto, *that much confusion in business arose in Chicago* in consequence of Petitioner's use of the word "Remington" in its *corporate name*, and the same name upon its machines and in its advertisements. The fact, however, is that the ordinary purchaser of writing machines does not go into *details.* He does not examine *name plates or catalogues* to ascertain by whom or where the machines are made.

R. pp. 370, 371, 450, 451, 452.

Very few purchasers know where or by whom the machines are manufactured.

R. p. 451, 544.

Furthermore the name and address "Remington-Sholes Company, Chicago," might well suggest to the ordinary unsuspecting purchaser that petitioner's business was a *branch* of Respondent's.

R. pp. 999, 1000.

In this case it was also established that the name "Remington-Sholes" was always used as a designa-

tion for petitioner's machines, and the term "Rem-Sho" was simply an abbreviation thereof.

Furthermore, it is not to be forgotten that the name "Sholes," which was suffixed or added to the name Remington, tended rather to accentuate the connection of the Remington-Sholes Co. with the respondent and its machine than to differentiate it.

It appears in the record that the name Sholes had been associated with the earliest form of respondent's predecessor's machines, in consequence of Sholes being one of the orignators thereof.

The earliest model put on the market by E. Remington & Sons Corporation was designated "Sholes & Glidden." *No two names could have been selected from the vocabulary of the world which were so well calculated to divert and injure the good will of respondent's business as the names Remington-Sholes*, and that petitioners *knew* this fact is shown by the continual iteration in their publications and by word of mouth that Mr. Sholes is the son of "the original inventor of the Remington Standard Typewriter" (Pet. 5) and that Mr. Remington is the "son of the original manufacturer of the well known typewriter that bears his name" (Pet. 5). We submit, therefore, that the petitioner's proposition that by making use of the suffix "Sholes" it did that which tended to differentiate its product from that of respondent's cannot be maintained. On the contrary the selection and use of the name "Sholes" added materially to the probabilities of mistake and tended to produce rather than to prevent confusion in business.

XII. Stress is laid in petitioner's brief upon the Remington-Sholes Co.'s endeavor "in every conceivable way" by alleged cautionary notices, etc., to prevent confusion (p. 37).

The only evidence in the record is the alleged fact (1) that in the year 1894 it placed in the window of one of its offices, to-wit, at *Chicago*, and had printed in the *Chicago* Directory for 1894, the ambiguous statement, "Not the Remington Standard" and (2) printed an alleged cautionary notice toward the end of its 24-page catalogue.

There is no evidence that it ever placed this notice on any other office window than that at *Chicago*, and this remained only a short time. There is no proof that the notice in the directory was renewed after 1894, which was before the machine was placed on the market.

The notice in the catalogue contained sundry misstatements of fact, and does not inform the public that the petitioner had no connection with the respondent or with the old Remington establishment at Ilion. Moreover, there is no evidence that these catalogues or notices came to the knowledge of the ultimate purchasers. In fact in the instances in the record where purchasers were misled it appears that no catalogues or notices were given them. On the contrary, in all notices and statements and instructions to agents and dealers they were constantly linking and connecting their business with that of respondent's and its predecessor, E. Remington & Son.

A typical example of petitioner's "instructions" to its agents and dealers may here be quoted:

"THE MACHINE HAS NOW BEEN FULLY EXPLAINED AND IT REMAINS WITH THE SALESMAN TO ADD SUCH OTHER INTERESTING FACTS, SUCH AS THE HISTORY OF THE COMPANY, THE CONNECTION OF OUR MR. REMINGTON WITH THIS MACHINE AND

THE RELATION TO THE OLD REMINGTON STANDARD, THE FACT THAT THIS IS A SECOND GENERATION OF TYPEWRITER BUILDERS, AND THAT THE SAME STANDARD OF EXCELLENCE IS BEING MAINTAINED IN THE MANUFACTURE OF THIS MACHINE AS ALL OTHER GOODS WHICH HAVE BEEN PRODUCED BY THE REMINGTONS."

Again, prominently on the title page of many of the catalogues "distributed broadcast through the country" (Brief, p. 9), were the words: "*The only machine now manufactured by a Remington.*" And in other publications petitioner said: "The only typewriter manufactured by a *Remington.* Strong, reliable and accurate, it represents the *second generation* of typewriter manufacturers bearing this great name."

These statements and others were continually made by agents and dealers by word of mouth and in advertising media.

The petitioners and their agents and dealers in offering for sale, advertising for sale and selling the so-called Rem-Sho (Remington-Sholes) machines, used among others the following names and designations, to wit:

Remington-Sholes Typewriter.
Rem-Sho Typewriter.
Remington Sholes Co.
REMEMBER THE NAME.
The Remington-Sholes Standard Typewriter.
REM-SHO.
Remington-Sholes.
Standard Typewriter.
Remington Imperial.
Remington Typewriters . . . . . called Remington Sholes.
Remington-Sholes.
Remington Sholes, New Model "Remington."
These Genuine Remingtons made by Remington Sholes.

Rem-Sho Typewriter.

The only typewriter manufactured to-day by a REMINGTON.

. . . . . It represents the SECOND GENERATION of typewriter manufacturers bearing this great name.

The only machine made by a Remington is the new Remington Sholes.

Rem-Sho Typewriter, the only machine now manufactured by Mr. Remington.

Mr. Franklin Remington, Son and Grandson of the old and celebrated American house is the only member of that family now engaged in the manufacture of a typewriter. . . . .

In conclusion we respectfully submit:

I. That if these petitioners have a remedy by appeal they ought to pursue it.

II. That there is involved in this case no question of such gravity or general importance as to make it the duty of this Court to issue the writ applied for herein.

III. That there is no conflict in the decisions of the United States Circuit Courts in this class of cases in respect to the principles of law governing them.

IV. That the Courts below in this case recognized and correctly applied the principles of law hitherto enunciated by this Court in this class of cases.

V. That the Courts below *found as a fact* that the name "Remington," which was selected, adopted and used in petitioner's corporate name and upon its machines, was not fairly or honestly bestowed, but was adopted and used for the purpose of filching the good will of complainant's business, and this finding must be taken on this application as presumptively correct.

VI. That the petitioners having admittedly had ample opportunity to fully present their contentions in this case to the Courts below, and having failed to satisfy either of those Courts as to their honesty and good faith in the selection, adoption and use of the name "Remington-Sholes" ought not to be allowed to burden this Court with a re-trial of the questions of fact involved herein.

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